No. 89-390

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,
v.
THE LTV CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AS *AMICI CURIAE* SUPPORTING RESPONDENTS

BERNARD KLEIMAN
CARL B. FRANKEL
PAUL WHITEHEAD
KARIN S. FELDMAN
Five Gateway Center
Pittsburgh, PA 15222

BRUCE H. SIMON
RICHARD M. SELTZER
BABETTE A. CECCOTTI
SOPHIA E. DAVIS
330 West 42nd Street
New York, New York 10036

ROBERT M. WEINBERG
(Counsel of Record)
JEREMIAH A. COLLINS
PETER O. SHINEVAR
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 10006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The American Federation of Labor and Congress of Industrial Organizations and the United Steelworkers of America, AFL-CIO, CLC jointly file this brief as *amici curiae* solely to address the following question:

Whether the adoption of a pension program that replaces some of the benefits lost by active and retired employees when the Pension Benefit Guaranty Corporation involuntarily terminated a defined benefit pension plan constitutes an "abuse" of the pension termination insurance program and provides a lawful basis for the PBGC to restore the terminated plan pursuant to Section 4047 of the Employee Retirement Income Security Act, 29 US.C. § 1347.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

STATUTES

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES—Continued

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC AS *AMICI CURIAE* SUPPORTING RESPONDENTS

This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 90 national and international unions with a total membership of approximately 14 million working men and women, millions of whom are covered by defined benefit pension plans that are subject to the statutory provisions involved in this case. The United Steelworkers of America, AFL-CIO, CLC ("USWA") is the union that negotiated the former defined benefit plans of respondent LTV Steel Company involved in this case. Those USWA plans covered some 20,000 active employees and some 45,000 retirees. After those plans were involuntarily terminated by petitioner Pension Benefit Guaranty Corporation, USWA and LTV negotiated the replacement benefit plan to which the PBGC objects in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The PBGC terminated two pension plans adopted as a result of collective bargaining between USWA and LTV. The PBGC then sought to undo that termination—restore the terminated plans—for two independent reasons. *First*, subsequent to the termination of the plans by the PBGC, USWA and LTV negotiated an employee benefit program designed to replace some of the benefits lost by retirees and employees as a result of the termination. The PBGC claims that this benefit program—which the PBGC calls a "follow-on plan"—constitutes an "abuse of the pension insurance program" to which restoration is a proper "response." Pet. Br. at 20. *Second*, the PBGC contends that restoration of the terminated plans

was justified because the financial "circumstances necessitating termination had changed." *Id.* at 32.

We take no position on the second issue—*viz.*, whether LTV had experienced such "financial improvement" that "there was no longer a financial basis for termination," *id.* The PBGC's position is that even in the *absence* of financial improvement, the adoption of a replacement benefit program such as the one at issue here constitutes a basis in and of itself for restoring a terminated plan. That is the contention we address in this brief.

As we will show, the PBGC has no business overseeing the kinds of benefit packages that a union and employer may adopt following a pension plan termination, and the adoption by collective bargaining parties of a replacement pension program affords no grounds for restoring a terminated plan.[1]

---

[1] The American Society of Pension Actuaries, in its brief *amicus curiae* in support of petitioner, agrees with our position that it is "misguided" for the PBGC to maintain that "'abusive follow-on plans' constitute a separate basis for restoration." ASPA Br. at 9. ASPA suggests, however, that "the establishment of follow-on plans," while "not a separate standard for restoration," may provide "evidence of changed financial circumsances." *Id.* We agree with that suggestion only in the sense that any expenditure a company undertakes, whether for pension programs or anything else, may cast light on the company's financial condition. Although, as stated, we take no position on the question whether LTV's finances had improved such that there was no longer a financial basis for termination, we submit that no real light is shed on that subject by LTV's adoption of the replacement benefit program at issue here. The adoption of that program constituted the settlement of a substantial contractual claim, *see infra* at 8, 27-30, and involved relatively small costs, particularly in view of the labor cost savings of $50 million per year that were achieved by LTV as part of the package, *see In re Chateaugay Corp.*, 89 Bankr. 779, 789 (S.D.N.Y. 1988), Pet. App. 45a.

The United States, as *amicus curiae*, also appears to part company with the PBGC's argument that the adoption of a "follow-on plan" constitutes a basis in and of itself for restoring a terminated plan. The United States' position is that "the findings [of financial capability] justifying restoration ought to vary depending on whether the employer has adopted an abusive follow-on plan." U.S. Br. at 24.

I.

1. The adoption of a replacement pension program did not add one penny to the liabilities the PBGC assumed as a result of its termination of the USWA/LTV pension plans. The Agency acknowledges that after a plan terminates, an employer who remains in business is generally free to allocate its available resources in the way that the employer considers most conducive to the success of its business, including the right to establish, through collective bargaining, new wage and benefit programs. But the PBGC argues that there is one limitation on that right: the benefits provided by any new pension plan may not be "substantially the same" as under the terminated plan. Although the PBGC is unable to define that standard with any precision, it is clear that the Agency's policy against "follow-on plans" seeks to prescribe the form (but not the cost) of the pension programs an employer and union may develop in collective bargaining after plan termination.

2. Nothing in ERISA suggests, much less specifies, that the sponsor of a terminated pension plan is disabled from negotiating any particular benefit package for its employees, including a "follow-on plan." Nor does the logic of the Act support such a theory.

Far from finding its source in the statute, the PBGC's policy turns ERISA on its head. Of all the wage and benefit programs an employer, or an employer and union, might adopt, a replacement pension program is the one most protective of the very interests ERISA is designed

---

According to the United States, where an employer has adopted such a plan the PBGC may order restoration unless there is a "significant chance of immediate retermination," while if such a replacement plan has not been instituted "the PBGC might reasonably decide to require greater evidence of financial improvement [before restoring the terminated plan]." *Id.* at 24-25. This suggestion falls somewhat short of the PBGC's single-minded approach, but as we will show, the United States' suggestion, which is made of whole cloth, still ascribes undue significance to the adoption of replacement plans as a factor in plan restoration. Our arguments responding to the PBGC's position apply equally to the United States' suggestion.

to promote. The statute's central objective is, after all, that employees and retirees should receive, to the greatest extent possible, the full pension benefits promised to them. Replacement pension programs are fully consistent with this statutory purpose; the PBGC's position is not.

3. The PBGC seeks to justify its action by asserting that if the replacement pension plan here is permitted, employers in *other* cases may rush to terminate their pension plans unnecessarily. This theory defies logic for two independent reasons. First, an employer *cannot* terminate an underfunded pension plan at whim. Congress has amended ERISA to ensure that an underfunded pension plan can be terminated only if the employer proves severe financial distress, or if the PBGC itself decides to terminate the plan.

Second, even if it were necessary or appropriate for the PBGC to be devising ingenious techniques to deter plans from terminating when the stringent termination criteria established by Congress are satisfied, the Agency's ban on "follow-on plans" is a uniquely ill-conceived means to that end. The PBGC's policy is founded on numerous unstated assumptions, none of which is discussed by the Agency, and all of which are counterintuitive.

II.

The PBGC's application of its "follow-on plan" policy is all the more wrong in this case, because the adoption of the replacement plan here was a good-faith settlement of a substantial lawsuit filed by USWA seeking enforcement of its contractual right to the continued payment of benefits after the termination of the original pension plans. That lawsuit was based on provisions of USWA's and LTV's collectively bargained pension agreements creating rights that survive plan termination—rights which, as the PBGC itself has previously acknowledged, are not rendered unenforceable by ERISA. The PBGC completely ignored this fact in its restoration decision in this case.

ARGUMENT

I. THE PBGC'S POLICY ON "FOLLOW-ON PLANS" HAS NO BASIS IN THE STATUTE THE PBGC IS CHARGED WITH ADMINISTERING

A recurring theme in the PBGC's brief is that the replacement pension program here somehow *increases* pension liabilities that were "unload[ed] . . . on the PBGC," Pet. Br. at 30, and thus *increases* the "subsidy" LTV receives from the pension insurance program, *id.* at 29, and LTV's "competitive edge," Brief *Amicus Curiae* of *Armco, et al.*, at ii, 2, 3. We readily concede that if the situation were as the PBGC hypothesizes, the Agency's position would be rooted in relevant statutory concerns. But the replacement pension program did nothing to increase the PBGC's liabilities over what those liabilities would be in the absence of such a program, or to create any employer subsidy. Not surprisingly, because the PBGC's premise is fatally flawed, the conclusion the Agency would draw as to the propriety of the replacement pension program here has no basis in the underlying statute.

When the PBGC terminated the LTV/USWA pension plans, a consequence required by ERISA was that the pension insurance program administered by the PBGC assumed the obligation of paying some of the plans' benefits that had previously been the responsibility of LTV. Congress could, of course, have limited such a government assumption of liabilities to situations in which the employer goes out of business. Congress did not do so. Thus, like many employers whose pension plans have been terminated, LTV remained in business after the termination. In these circumstances, to the extent that the PBGC's pension insurance program is funding benefits to LTV's employees and retirees, it can be said that LTV is receiving a government "subsidy" for part of what had been the company's employment costs. That "subsidy" is a congressionally mandated consequence of the

PBGC's action in terminating the LTV plans, and is unaffected by whatever wage, benefit, or other program LTV might adopt subsequent to the termination.

After the termination, LTV, like any ongoing enterprise, had to allocate its available resources in the way the company considered most conducive to its business success. Among other things, the termination had a substantial adverse effect on LTV's employees and retirees. A critical question that naturally arose in this situation was what LTV and USWA, the employees' exclusive bargaining representative, were to do to meet the new situation that had been created by the termination.

It is the PBGC's position here that the one thing the collective bargaining parties were *not* free to do was to establish a new pension program, funded by LTV, that replaced some of the benefits lost by employees and retirees as a result of the termination. According to the PBGC, negotiating such a program constitutes an "abuse of the pension insurance program." Pet. Br. at 20. At the same time, the PBGC acknowledges that it would *not* have been an "abuse" of that insurance system for LTV, instead of creating a replacement pension program, to have put the *same amount of money* into some other pension program, or some other form of employee wage or benefit program, or, for that matter, to have put that money into any other form of corporate expenditure. *See infra* at 10-12. Yet the replacement program has *no* different effect than such other forms of expenditures on the PBGC's obligations or on LTV's "subsidy." In each instance, the effect is zero.

Accordingly, the issue with respect to what the PBGC calls "follow-on plans" has nothing to do with increasing either the PBGC's obligations or any employer "subsidy." Rather, the question is whether, after certain pension liabilities of an employer have been *properly assumed* by the PBGC as a result of a proper plan termination, the employer and union are disabled from negotiating a partic-

ular kind of replacement pension program, where that replacement program is entirely lawful and does not increase the liabilities assumed by the PBGC. It is our submission that the answer to that question is "no." The decision of labor and management as to the form of the wage and benefit package to be instituted following termination of a pension plan provides no basis for the forced restoration of that plan.

A. 1. It is important to understand precisely what is involved here. The PBGC terminated LTV's pension plans involuntarily under 29 U.S.C. § 1342. The reason for that action was that in "the depressed state of the steel industry," Pet. Br. at 34, the plans had become "severe[ly] underfund[ed]," *id.* The PBGC concluded that its potential long-term insurance liability, which then amounted to approximately $2.1 billion of the plans' $2.3 billion underfunding, was likely to increase over time if the plans were not terminated. *Id. See* JA 138-40.

As a result of the termination over 8,000 USWA retirees suffered an immediate, severe loss of monthly pension benefits; in some cases, the losses exceeded fifty percent of the retirees' income.[2] In addition, some 20,000 active USWA employees ceased to accrue further pension benefits or to earn retirement eligibility under the terminated plans. Pet. App. 42a-43a.

As the case now comes before this Court, the question whether that involuntary termination was proper is not presented, and it must therefore be taken as given that the PBGC's action in involuntarily terminating the plans was in accord with the applicable statutory criteria. Indeed, the PBGC has stated that although the termination was an involuntary one pursuant to 29 U.S.C. § 1342, LTV's financial condition was such that it "could probably have satisfied" even the stringent standards for

[2] As the district court noted, some of the most significant losses occurred because "[c]ertain early retirement, disability, and surviving spouse benefits . . . were terminated completely." Pet. App. 42a.

voluntary "distress" terminations now found in 29 U.S.C. § 1341(c).[3] The PBGC's determination that an involuntary termination was necessary meant, as a matter of law, that the PBGC would be required to assume the expense of the benefits guaranteed by ERISA, 29 U.S.C. §§ 1322(a), 1361, and that LTV would in turn be liable to the PBGC as provided by law, 29 U.S.C. § 1362.

Although LTV's plans had been terminated, and LTV had filed for reorganization under Chapter 11, LTV was, as we have noted, still a going concern, and USWA and LTV had to address the terms and conditions of employment that would apply during the pendency of the reorganization case. In addition, USWA had filed an adversary proceeding against LTV in the bankruptcy court, based on contract rights that were unaffected by the plan termination, *see infra* at 27-29, and seeking payment under the collectively bargained pension agreements of "pension benefits provided by [USWA's] collective bargaining agreements with LTV Steel but not guaranteed by PBGC." *In re Chateaugay Corp.*, 826 F.2d 1177, 1178 (2d Cir. 1987). The bankruptcy court had urged the parties to settle that contract suit.

---

[3] PBGC, *Promises at Risk* 32 (1987), *reprinted in PBGC Proposal to Initiate a Variable Rate Premium: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 40 (1987). *See infra* at 18-20. Nor is there any finding in this case that LTV had taken improper actions to force the involuntary termination. To the contrary, the district court distinguished this case from such a situation. Pet. App. 96a n.27. As that court noted, *id.*, the statement by Senator Nickles at 132 Cong. Rec. 4887 (1986), to which the PBGC refers at page 23 of its brief, referring to "abuse" as a ground for restoration of a plan, was directed at situations where an involuntary termination was improperly induced, and that is not the case presented here.

When the plans were terminated, USWA argued that the consent order effectuating the termination "was obtained in a procedurally deficient manner," *Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 198 (2d Cir. 1987), because USWA had received no notice or information as to the basis of the termination, but that contention was rejected, *id.*

For these reasons, USWA and LTV negotiated a comprehensive new interim collective bargaining agreement. That agreement included the replacement plan at issue here, which was designed to make up for *some* (but not all) of the benefits that active and retired employees had lost as a result of the PBGC's termination of the prior plans. JA 163-67.[4] The adoption of the collective bargaining agreement, including the replacement plan, constituted a settlement of USWA's contract lawsuit, and was approved by the bankruptcy court as "clearly necessary and appropriate to the goal of rehabilitation for this Chapter 11 Debtor," JA 260.

The adoption of the replacement plan did not affect in any way the pension liabilities that the PBGC assumed as a result of the termination or LTV's resulting financial obligations to the PBGC. The benefits provided by the replacement plan are neither paid for nor guaranteed by the PBGC. Pet. App. 109a. Thus, the replacement plan did not increase the PBGC's obligations by one cent. Whatever the amount of "subsidy" or "competitive edge" that LTV has received as a result of *the PBGC's decision* to terminate the prior plans—a decision which, as indicated, is not challenged in this Court—that amount remained unchanged by the adoption of the replacement plan.

---

[4] The retirees' hardship had become so obvious to all concerned that in April 1987 all parties, including the PBGC, had consented to an order approving a "hardship" payment to retirees pending the outcome of negotiations between LTV and USWA. Pet. App. 44a. As the district court stated, the replacement plan that was subsequently negotiated filled the urgent need of providing retirement income for the "[t]housands of retirees who were solely dependent on pension benefits for food, clothing, housing and other essentials [but who] received substantially reduced pension benefits following termination," as well as the need to establish a replacement retirement program for the "[t]housands of current employees who had worked in return for a contractually guaranteed right to early retirement [but who] forfeited such benefits and stopped accrual of service for any pension plan" following termination. Pet. App. 42a-43a.

2. The PBGC does not dispute that it was permissible for LTV and USWA to negotiate a new collective bargaining agreement in the wake of the Chapter 11 filing and the involuntary termination of the plans. And the PBGC would *not* have claimed a right to restore the terminated plans if, for example, LTV, relieved of the financial burden of an underfunded pension plan, had increased wages for active employees, had made extensive capital expenditures for the company's future operations, or even had given a bonus to senior management. Indeed, the PBGC states that the Agency would have had no objection if LTV had established a new pension plan for active employees, no matter how rich in funding or benefits, as long as the benefits of the new plan were not "substantially the same . . . as if no termination had occurred." Pet. Br. at 7.

The Agency's test for distinguishing between permissible and impermissible replacement plans does *not*, in other words, turn on cost; indeed, the PBGC advised USWA and LTV that the Agency "does not care how much is contributed to a new plan" or what its total cost would be.[5] Nor does the PBGC care if the benefits of a new plan for active employees are "generous," JA 265.

Rather, the PBGC seeks to prescribe the particular *form* of pension benefits that an employer and union may negotiate after a plan has been terminated. It is not clear precisely what forms of benefits render a replacement plan "substantially the same" as a terminated plan in the PBGC's eyes. Indeed, despite the PBGC's claim that the USWA/LTV replacement plan was sufficiently similar to the terminated plans as to run afoul of the Agency's policy, both of the courts below found that there were fundamental differences between the old and new plans, and that "[n]owhere in the record is

[5] See the description of the PBGC's position in the letter from USWA President Lynn Williams to PBGC Deputy Executive Director Royal Dellinger, dated July 29, 1987, at 2, Exhibit H to the Declaration of Richard M. Seltzer, Dist. Ct. Docket No. 71 (Feb. 23, 1988).

there a showing that PBGC undertook an analysis of these differences." *PBGC v. LTV*, 875 F.2d 1008, 1017 (2d Cir. 1988), Pet. App. 19a; *In re Chateaugay*, 87 Bankr. at 819-20, Pet. App. 107a-109a.[6]

Although the PBGC has refused to specify precisely what its policy requires, the Agency advised USWA that it would be impermissible, for example, for a replacement plan to provide in any way for "disability benefits, widow's benefits, [or] benefits for victims of future [plant] shutdowns;"[7] and in its brief the PBGC states only that it "has never objected to employees earning new pension benefits *based solely on their post-termination service*." Pet. Br. at 7 n.8 (emphasis added). *See also* U.S. Br. at 6 n.4 ("The PBGC would not consider it abusive if, for example, an employer created new *defined contribution* plans *that did not differentiate among participants based upon their past service*" (emphasis added)); JA 265 (letter from PBGC Deputy Executive Director Royal Dellinger to USWA President Lynn Williams) ("PBGC would accept the establishment of a traditional, *future service, defined contribution* plan for *active* employees who are participants in the Plans") (emphasis added). Those statements leave no room for any kind of replacement plan for retirees (who by definition have no "post-termination service"),[8] and also preclude any effec-

[6] For example, the basic program for active employees under the replacement plan is a defined contribution rather than a defined benefit plan. *In re Chateaugay*, 87 Bankr. at 820, Pet. App. 109a. The plan is not protected by the PBGC insurance program, and each participant bears the risk that the Company will cease making contributions or that the contributions made will have a poor rate of investment return.

[7] Letter from Lynn Williams to Royal Dellinger, *supra* note 5, Dist. Ct. Docket No. 71.

[8] In an affidavit filed in the bankruptcy court, PBGC Executive Director Utgoff stated flatly that the PBGC opposes any replacement plan that "provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC." JA 229.

tive restoration of early retirement options for active employees.[9]

Whatever may be the precise contours of the PBGC's policy, it is clear that the policy seeks to prescribe the form (but not the cost) of the pension programs an employer and union may develop in collective bargaining following plan termination, even though the programs will have no effect on the amount of liability that flows to the PBGC as a result of the termination.

As we next show, the PBGC's policy on "follow-on plans" has no basis in ERISA. While that alone is sufficient to sustain the decision below, we would be derelict if we did not note two preliminary points.

First, the PBGC's policy means that in "distress termination" situations—*viz.*, situations in which an employer would in all probability be forced to liquidate if required to reassume its full funding obligations to its original pension plan, *see infra* at 19-20—employers and unions are put to the following Hobson's choice: either foregoing all possibility of negotiating plans that protect the interests of long-term employees and of retirees within the limits of the employer's resources, or attempting to meet that moral obligation at the risk of having the ongoing operation shut down and all current jobs lost.

Second, the PBGC's policy cannot be reconciled with the national labor policy in favor of free collective bargaining. As we have noted, the PBGC certainly has a

[9] Thus, the PBGC has stated as a hard and fast rule that a replacement plan may not "grant[] credit for purposes of benefit accrual . . . for service rendered under the terminated plan." JA 229. This rules out any replacement plan that seeks to restore a benefit such as the "30-and-out" pension in the terminated LTV plans. Under that provision employees could retire after 30 years of service without waiting until normal retirement age. By prohibiting a replacement plan from granting credit for service under the terminated plan, the PBGC would prevent a replacement plan from restoring this lost early retirement option in any way, even for an employee who was just one day short of completing his thirtieth year when the PBGC terminated the plans.

valid interest in assuring that where an employer which has terminated a plan reacquires financial health, the employer, and not the PBGC, pays the cost of the original plan's guaranteed benefits. Congress has provided the legal tools to assure that this obligation is satisfied, *see infra* at 14. But, as we have stressed, the PBGC's policy on "follow-on plans" goes well beyond such financial considerations. If approved, that policy would provide the Agency the authority to determine the composition of a wage-benefit package, the total cost of which the PBGC concedes is in no way improper. That approach unjustifiably trenches on Congress' determination that labor and management are ordinarily to be accorded "wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960).[10]

B. The PBGC's policy with respect to "follow-on plans" has no basis in ERISA's language, structure or legislative history. What is more, that policy is at war with that statute's central purpose. And, on its own terms, the policy rests on counterintuitive assumptions, which the Agency has not explained or even acknowledged.

1. One searches ERISA in vain for any condemnation of "follow-on plans." The statute specifies the consequences that are to flow from a plan termination: the PBGC is to pay certain guaranteed benefits, 29 U.S.C. §§ 1322(a), 1361, and the employer is to be liable in turn to the PBGC in specified amounts, *id.* § 1362. Nothing in the

[10] *See also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526 (1984) (in bankruptcy, as in other contexts, "the national labor policies of avoiding labor strife and encouraging collective bargaining . . . generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference"); *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980) (It "does not behoove a court to second-guess either that process or its products"). And, administrative agencies have been admonished not to intrude on the collective bargaining process where this can be at all avoided. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172-73 (1962).

statute even suggests, much less specifies, that the sponsor of a terminated plan is disabled from negotiating any particular benefit package for its employees, including a "follow-on plan".[11]

Nor does the logic of the Act suggest that the adoption of any particular kind of replacement pension program should result in the restoration of a terminated plan. Because the determination whether a plan is to be terminated turns on the plan's and the plan sponsor's financial condition, 29 U.S.C. §§ 1341(b)(2), 1341(c)(2)-(3), 1342(a), it stands to reason that the test for determining whether a terminated plan may be restored is: have the relevant financial conditions changed so that the plan can be made "sufficiently solvent." H. R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 378 (1974). That rationale cuts against the notion that a terminated plan should be restored merely because the employer and union have negotiated a replacement plan to make up some of the benefits lost as a result of the termination.[12]

Perhaps most to the point, ERISA's purposes and policies strongly suggest that an employer and union that seek to reestablish benefits to the limits of the available resources are acting properly, not improperly. Of all the wage or benefit programs an employer, or an employer and a union, might adopt, a replacement pension plan is

[11] Indeed, when the PBGC proposed such a provision, Congress declined to enact it. *See infra* at 22.

[12] *See* note 1 *supra* (discussing position of American Society of Pension Actuaries). For purposes of our argument it is not necessary to assert that financial improvement is the only factor the PBGC may consider in deciding whether to restore a plan under § 4047 of ERISA, although the legislative history points in that direction. *See* H.R. Conf. Rep. No. 93-1280, *supra*, at 378-79. We do maintain, however, that the logic of the statute dictates that restoration of a terminated plan must be predicated on a showing that the basis for the termination has been vitiated. Assuming *arguendo* that there may be factors other than financial improvement that would bear on that analysis—although we can conceive of none—for the reasons that we develop in our argument the adoption of a replacement plan is not such a factor.

the one most protective of the very interests ERISA is designed to promote. To select out such a program as an "abuse" of the statute is to turn ERISA on its head.

ERISA's fundamental purpose is to protect employees' expectations in the pension benefits they have earned and "to prevent 'the great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (quoting 120 Cong. Rec. 29950 (1974) (statement of Sen. Bentsen)). As this Court explained:

> *Congress wanted to . . . mak[e] sure that if a worker had been promised a defined pension benefit upon retirement*—and if he has fulfilled whatever conditions are required to obtain a vested benefit—*he actually will receive it.* [*Id.* at 375 (emphasis added).]

By definition, the adoption of a replacement plan, which pays pension benefits that the PBGC does not guarantee, advances "the continued well-being and security of . . . employees and their dependents," 29 U.S.C. § 1001(a), and "increase[s] the likelihood that participants and beneficiaries . . . will receive their full benefits," *id.* § 1001b (c)(3). Thus, a replacement plan that provides for the payment of amounts that more closely approach an active employee's or retiree's "full benefits" than does the PBGC's limited guaranty can hardly be labeled an "abuse" of ERISA's pension termination insurance program.

To be sure, Congress placed limits on the levels of benefits that are guaranteed by the PBGC, in order to limit the PBGC's potential liability. 29 U.S.C. § 1322 (b); S. Rep. No. 93-383, 93d Cong., 1st Sess. 26 (1973). But Congress intended that the PBGC's pension guarantees would provide a *floor* below which pension benefits will not fall, *not* a ceiling above which they may not rise. *E.g.*, H.R. Rep. No. 100-391, 100th Cong., 1st Sess. 109 (1987) ("The PBGC guaranty program has always been merely a floor of protection for basic benefits."); 120 Cong. Rec. 4283 (1974) (statement of Rep. Gaydos); S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS

598 & n.218 (1988). *See also infra* at 28-29. Indeed, Congress has affirmatively sought to assure that active and retired employees will receive more than the minimum benefits that are guaranteed under the insurance program when a plan terminates.

Thus, in the Single-Employer Pension Plan Amendments Act of 1986 ("SEPPAA"),[13] which was in effect at the time of the termination of the USWA/LTV plans, Congress enacted ERISA § 4049, with the purpose of "ensur[ing that plan sponsors] do not evade responsibility for paying benefits which have been earned by participants and beneficiaries, but which are *not guaranteed* by the PBGC." H.R. Rep. No. 99-241, Pt. 2, 99th Cong., 1st Sess. 52-53 (1985) (emphasis added).[14] Subsequently, in the Pension Protection Act of 1987 ("PPA"),[15] which is now in effect, Congress expanded on these protections, repealing § 4049 and substituting in its place a provision requiring the PBGC to collect the full amount of the employer's liability for *all* promised benefits, guaranteed and non-guaranteed alike, and to "pay[] out a portion of unfunded benefit liabilities *in excess of unfunded guaranteed benefits* based on the total value of PBGC's recovery. . . ."[16] These enactments manifest Congress' intent

[13] Pub. L. No. 99-272, title XI, 100 Stat. 237 (1986).

[14] Section 4049, 29 U.S.C. § 1349 (Supp. IV 1986), provided for the creation of a trust after every termination of an underfunded pension plan, for the purpose of collecting liability payments from the plan sponsor totaling up to 75 percent of all non-guaranteed benefits, in order to distribute the proceeds to participants. *See* 29 U.S.C. §§ 1349, 1362(c) (Supp. IV 1986).

[15] Pub. L. No. 100-203, title IX, subtitle D, part II, 101 Stat. 1330-333 (1987).

[16] H.R. Conf. Rep. No. 100-495, 100th Cong., 1st Sess. 848 (1987) (emphasis added). Under the PPA, a plan sponsor and members of its controlled group are liable for the total amount of unfunded benefit liabilities, including liabilities for non-guaranteed benefits. 29 U.S.C. § 1362(a) (Supp. V 1987). In addition to paying benefits guaranteed under § 4022(a) and (b), *id.* § 1322(a) & (b), the PBGC is obligated to pay to participants a percentage of non-

that to the extent possible retirees and employees should receive *all* of the pension benefits promised them, including benefits not guaranteed by the insurance program.

The USWA/LTV replacement plan, and replacement plans in general, are therefore entirely consistent with congressional intent. Such plans "increase the likelihood that participants and beneficiaries . . . will receive their full benefits." 29 U.S.C. § 1001b(c)(3). The PBGC's opposition to such plans contravenes that central legislative purpose.

2. Having failed to establish that the adoption of the replacement plan in *this* case was in any way contrary to the provisions or policies of ERISA, the PBGC proposes an alternative justification for its actions, based on the supposed danger that employers in *other* cases will rush to terminate pension plans unnecessarily. Thus, the Agency asserts that "[i]f follow-on plans are permitted, they will inevitably lead to additional terminations that would jeopardize the pension insurance program." Pet. Br. at 28-29. According to the PBGC, employees and retirees must suffer the certain loss of pension benefits when a plan terminates so that employees and unions will have the incentive to resist employer efforts to terminate pension plans. *Id.* at 28. Without the deterrent effect of this threatened loss of accrued pension benefits—which the PBGC euphemistically refers to as "coinsurance"[17]—the PBGC claims that more underfunded pension plans will be terminated. *Id.* at 29-30; *see also* U.S. Br. at 12. There is no merit to this contention.

guaranteed benefits generally equal to the percentage of total liability recovered by the PBGC. *Id.* § 1322(c).

[17] The term "coinsurance" is found nowhere in ERISA or its legislative history. The *only* source cited for this notion is a 1989 publication by R. Ippolito. Pet. Br. at 28; U.S. Br. at 5. Mr. Ippolito is Chief Economist at the PBGC and has held that job throughout the Agency's litigation with LTV. *See* PBGC, *Annual Report to the Congress: Fiscal Year 1988*, at 50; PBGC, *Annual Report to the Congress: Fiscal Year 1987*, at 57.

a. The PBGC's assertion that if "follow-on plans" are allowed, more underfunded pension plans will be terminated ignores ERISA's statutory scheme. Simply put, an employer *cannot* terminate an underfunded pension plan at whim. While an employer may have had such a right when the PBGC first adopted its policy against "follow-on plans"—specifically, at the time the PBGC issued the informal opinion letters upon which the Agency still so doggedly relies [18]—any such right was lost in 1986, when SEPPAA was enacted. By enacting SEPPAA Congress has now provided that an underfunded plan can be terminated only if the employer proves severe financial distress, or if the PBGC itself decides to terminate the plan.

(i) Congress enacted SEPPAA for the express purpose of limiting terminations of underfunded pension plans.[19] SEPPAA changed then-existing law, under which "plan sponsors [were] free to terminate their single-employer pension plans at any time (subject to any contractual limitations)," [20] and instead created two types of voluntary plan terminations—"standard terminations" and "distress terminations." [21]

As amended by SEPPAA, ERISA allows an employer "to terminate a plan in a standard termination only if the plan holds sufficient assets to pay all 'benefit commitments' under the plan," including benefits the PBGC does not guarantee.[22] A standard termination thus causes no losses to employees and retirees of accrued benefit commitments and imposes *no* liability on the PBGC.[23] The PBGC's complaints about replacement plans therefore have no conceivable relevance in the case of standard terminations.

[18] PBGC Opinion Letter 81-11, Pens. Rep. (BNA) No. 367 at R-3 (May 11, 1981), LEXIS, Labor Library, PBGC file (Pet. App. 159a); PBGC Opinion Letter (unpublished) (April 24, 1981) (Pet. App. 165a); PBGC Opinion Letter 86-27, 14 Pens. Rep. (BNA) No. 10 at 306 (Dec. 17, 1986), LEXIS, Labor Library, PBGC file (Pet. App. 172a), *cited in* Pet. Br. at 8 n.9, 26 n.17, 27, 31 n.20. These letters addressed plan terminations occurring before SEPPAA's effective date of January 1, 1986.

[19] H.R. Rep. No. 99-241, Pt. 2, 99th Cong., 1st Sess. 41-42 (1985).

[20] *Id.* at 41 (1985); *see* 29 U.S.C. § 1341(a) (1982).

[21] 29 U.S.C. § 1341(b) & (c) (Supp. IV 1986); H.R. Conf. Rep. No. 99-453, 99th Cong., 1st Sess. 575 (1985).

If a pension plan lacks sufficient assets to pay all benefit commitments, an employer may voluntarily terminate the plan only through a "distress termination." 29 U.S.C. § 1341(c). In order to qualify for a distress termination, however, an employer must demonstrate "a financial inability to continue the funding of a plan." H.R. Rep. No. 99-241, Pt. 2, *supra*, at 48. SEPPAA requires that to effect a distress termination an employer must either (i) be liquidating under Chapter 7, (ii) be reorganizing under Chapter 11 and receive the bankruptcy court's approval,[24] or (iii) "demonstrate[] to the satisfaction of the [PBGC]" either that the employer "will be unable to pay [its] debts when due and continue in business," or that "the costs of providing pension coverage have become unreasonably burdensome." 29 U.S.C. § 1341(c)(2)(B).

These distress criteria limit voluntary terminations of underfunded pension plans "to cases of severe business hardship" and "extreme need." H.R. Rep. No. 99-241, Pt. 2, *supra*, at 29, 32. As the PBGC summarized in a 1987 report to Congress: "SEPPAA's distress standard effectively eliminates the opportunity for healthy firms to terminate underfunded plans at times of their choos-

[22] H.R. Conf. Rep. No. 99-453, *supra*, at 575; *see* 29 U.S.C. § 1341(b); *accord* H.R. Rep. No. 99-241, Pt. 2, *supra*, at 46.

[23] H.R. Conf. Rep. No. 99-453, *supra*, at 575; H.R. Rep. No. 99-241, Pt. 2, *supra*, at 46-47.

[24] As amended by PPA, in order to approve a distress termination a bankruptcy court must "determine that, unless the plan is terminated, [the employer] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. § 1341(c)(2)(B)(ii)(IV) (Supp. V 1987).

ing." *Promises at Risk, supra,* at 24. Or, as the United States succinctly puts it in its *amicus* brief, "a reorganizing company may terminate an underfunded plan only when the alternative is liquidation." U.S. Br. at 4.[25]

SEPPAA's stringent criteria for distress terminations therefore eliminate the PBGC's stated rationale for the Agency's opposition to replacement plans.

Nor does the possibility of an *involuntary* termination (the kind of termination involved in this case) provide a rational basis for the PBGC's "coinsurance" argument. By definition, involuntary terminations are undertaken *by the PBGC.* 29 U.S.C. § 1342(a). Accordingly, the PBGC's claimed need to "align the interests of employees with the PBGC and against termination," Pet. Br. at 28, is inapposite when the PBGC itself is terminating the plan.[26] The PBGC can, and no doubt will, refuse to terminate underfunded plans unless the Agency believes there is a sound economic reason for its action.

Finally, contrary to what the PBGC seems to suggest, *see* Pet. Br. at 29-30, an employer cannot force an involuntary plan termination upon an unwilling agency. An employer cannot simply refuse to fund its pension plans while depleting the plan's assets through the continued payment of benefits until the plan becomes "unable to pay benefits when due." 29 U.S.C. § 1342(a)(2). ERISA contains enforceable minimum funding standards for defined benefit pension plans, which prevent an employer from refusing to fund a pension plan. 29 U.S.C. § 1082; H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 283 (1974); H.R. Rep. No. 93-353, 93d Cong., 1st Sess. 14 (1973). Indeed, Congress has strengthened ERISA's minimum funding standards so as to prevent

[25] SEPPAA's restrictions have had their desired effect. The PBGC's most recent annual report states that "[i]n all of the distress terminations in FY 1988, the employer had gone out of business or would have done so had the plan not been terminated." PBGC, *Annual Report to the Congress: Fiscal Year 1988,* at 12.

[26] Indeed, in this case USWA sought to vacate the PBGC's involuntary termination of the USWA pension plans. *See supra* note 3.

a pension plan from simply running out of money and thus compelling an involuntary termination. 29 U.S.C. § 1082 (Supp. V 1987); 26 U.S.C. § 412 (Supp. V 1987). H.R. Rep. No. 100-391, 100th Cong., 1st Sess. 984 (1987); H.R. Conf. Rep. No. 100-495, 100th Cong., 1st Sess. 847-60 (1987).[27]

(ii) At the same time that Congress acted to restrict unnecessary terminations of underfunded pension plans, the Legislature also made other changes that work in the same direction. First, as noted, Congress increased employers' minimum funding obligations for ongoing pension plans so as to strengthen plans' balance sheets and thus reduce the potential need for future terminations. *See supra* at 20-21. Second, SEPPAA and PPA each increased an employer's liability in the event of a distress or involuntary termination. 29 U.S.C. § 1362 (Supp. IV 1986 & Supp. V 1987).[28]

[27] The United States refers to "[a] statement in the court of appeals' opinion" to the effect that if an employer is reorganizing under Chapter 11 of the Bankruptcy Code, the employer's obligation to fund its pension plan constitutes a pre-petition debt that is entitled to "no special priority." U.S. Br. at 22 n.18, quoting Pet. App. 23a-24a. The United States asserts that that statement, "if followed," would enable employers to refuse to fund a pension plan by going into Chapter 11, with the result that the PBGC would be induced to terminate such plans involuntarily. U.S. Br. at 22 n.18. The PBGC states, however, that the court of appeals erred in concluding that the funding of a plan "suffers," Pet. App. 24a, as a result of a Chapter 11 filing, *see* Pet. Br. at 37-38; for the PBGC maintains that pension funding obligations *are* entitled to priority in bankruptcy, *id.* at 38-39. The United States agrees with this view of the law. *See* U.S. Br. at 23 n.18.

[28] The increases in termination liability (i) reduce an employer's incentive to seek plan termination by making that option more costly, (ii) improve the PBGC's entitlement to recover from an underfunded plan's sponsor by repealing ERISA's original cap on termination liability of thirty percent of an employer's net worth, and (iii) make it possible for participants to obtain benefits in excess of guaranteed levels, even where employees and retirees lack a contractual claim to non-guaranteed benefits. H.R. Rep. No. 100-391, *supra,* at 123-25; Senate Comm. on Finance, *Explanation of Provisions Approved by the Committee on December 3, 1987 for*

Significantly, while it was taking these steps Congress refused to enact the PBGC's "coinsurance" theory into statutory law. Congress *rejected* a proposal to prohibit "follow-on plans," even though the PBGC urged that result. In early 1987, the Administration presented Congress its "Proposal on the Funding and Termination of Defined Benefit Pension Plans."[29] The Proposal sought restrictions on the adoption of replacement plans after an underfunded pension plan terminates:

> *Plan Reestablishments.* Except to the extent permitted by the PBGC, an employer (and its controlled group) would be precluded from establishing retirement programs which, in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits.[30]

Although Congress in enacting the Pension Protection Act included many of the reforms the PBGC sought, Congress *rejected* the PBGC's proposed restriction of replacement plans.[31]

Inclusion in Leadership Deficit Reduction Amendment, S. Print No. 100-63, 100th Cong., 1st Sess. 189-90 (1987); H.R. Rep. No. 99-241, Pt. 2, *supra*, at 41-42, 51-53; *see supra* at 16-17.

[29] The Administration Proposal is reprinted in *Overfunding and Underfunding of Pension Plans: Joint Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 100th Cong., 1st Sess. 28-61 (1987). The Proposal was jointly developed by the PBGC, the Department of Labor, and the Department of the Treasury, *see* PBGC, *Annual Report to the Congress: Fiscal Year 1987*, at 8, and the PBGC actively supported the Proposal before Congress. *See, e.g., Joint Hearing, supra*, at 11-12.

[30] *Administration Proposal, supra*, at 18, *reprinted in* Joint Hearing, *supra*, at 52.

[31] *See* H.R. Conf. Rep. No. 100-495, *supra*, at 879-85 (1987). Of the four committees that considered the Administration Proposal, the House Committee on Ways and Means was the only one that reported out a bill that would have restricted follow-on plans. *Ibid.* The Ways and Means Committee stated that its proposed amendment would have been a change in "present law." H.R.

b. Even if, contrary to what we have just shown, it were necessary and appropriate for the PBGC to be devising ingenious techniques to deter plans from terminating when the stringent termination criteria established by Congress have been satisfied, the Agency's ban on "follow-on plans" is a uniquely ill-conceived means to that end. The PBGC's policy is founded on numerous unstated assumptions, none of which is discussed, or even identified, by the PBGC. All of these assumptions are counter-intuitive.

To begin with, the PBGC's restrictions on replacement plans may well *increase* the economic incentives for companies to terminate underfunded pension plans. By removing from the bargaining table a whole range of replacement benefit packages that a union might seek, including any real possibility of a new plan for persons already retired, *see supra* at 10-12, the PBGC's policy necessarily strengthens management's hand in bargaining, making it likely that the collective bargaining agreement that will emerge from post-termination bargaining will be less costly to management than would otherwise be the case. This should make termination *more* attractive to employers, not less.

In the face of this increased economic incentive to terminate, the PBGC's policy necessarily assumes that union or employee resistance will overcome an employer's economic self-interest in termination. Yet there is no explanation, either in the administrative record or in the PBGC's brief, as to why an employer's self-interest in achieving cost savings is not a stronger motivation than its desire to satisfy union or employee preferences. Obviously, no union is assured of receiving all its hopes in collective bargaining; many receive far less. And companies, especially financially troubled companies, often

---

Rep. No. 100-391, 100th Cong., 1st Sess. 1010 (1987). Contrary to the PBGC's suggestion, Pet. Br. at 25, *no* congressional committee suggested that the PBGC's proposal was unnecessary because similar authority already existed under ERISA. *See, e.g.*, H.R. Rep. No. 100-1122, 100th Cong., 2d Sess. 56-57 (1988).

eschew a "smoother road" (*see* U.S. Br. at 20) in an effort to obtain a bigger pot of gold at the end of that road.

Moreover, the PBGC's "deterrence" rationale either proves nothing or proves far too much. An employer can choose to mollify union opposition to plan termination in any number of ways, such as by offering a wage increase or bonus. To use the PBGC's terms, an employer may attempt to repay the "coinsurance" premium from plan termination with higher benefits elsewhere, without incurring the PBGC's wrath. Such employer actions could have precisely the same purpose and effect—*viz.*, overcoming a union's objections to termination—as the PBGC discerns in replacement plans. Thus, the PBGC's logic leads to the conclusion that in order to prevent "abusive" plan terminations, the Agency must be given *carte blanche* to regulate *all aspects of employee wages and benefits* after a pension plan termination. Even the PBGC shrinks from that result.

Indeed, the PBGC does *not* object to a new *pension plan* as long as the plan does not make up for the particular losses to employees and retirees caused by the former plan's termination. *See supra* at 10-12. Rather, the PBGC objects in particular to replacement plans that give credit for past service. *Id.* That objection does not preclude the creation of a new prospective plan, even a very rich one, for *active* employees, but does preclude the creation of any benefits for persons who have already retired. The PBGC thus would allow active employees to have a new pension plan, even one more generous than the plan that has been terminated, as long as the active employees are willing to sacrifice the interests of retirees. While USWA was not willing to make that sacrifice, the PBGC offers no reason why other unions or unorganized employee groups might not gladly accept such a trade-off; indeed, the possibility of improving benefits for active employees at the expense of retirees might make plan termination affirmatively desirable to some employee groups. And one would think, in view of the policies of

ERISA, that such a sacrifice of retirees' interests is the last thing the PBGC would wish to encourage.

The ultimate indication that the PBGC's concept of pension insurance "abuse" has no logic behind it is the fact that the PBGC cannot even define with any precision what it is that makes one post-termination pension plan "abusive" and another not. *See supra* at 10-12. In the face of the recognition by both courts below that the USWA/LTV replacement plan does not fit the PBGC's own asserted definition of an abusive plan, Pet. App. 19a, 107a-109a; *see supra* at 10-11, the PBGC refuses to discuss these points, pleading that the Agency "must have flexibility" to decide when a plan constitutes an "abuse." Pet. Br. at 31 n. 20. If there were any logic or coherence to the PBGC's policy, the agency would not need to wrap itself in this protective cloak.

c. If the PBGC were to face up to the inconsistencies, counterintuitive assumptions and apparent illogic that underlie its "follow-on plan" policy, perhaps the Agency could somehow come up with a rational defense of its position—although none suggests itself. But as the case stands the PBGC has not explained, or even acknowledged, any of these matters. This in itself is fatal to the Agency's position.

The PBGC, like any other administrative agency, "must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 48 (1984). Here, the administrative record offers no explanation of the PBGC's policy choice, and the PBGC's Notice of Restoration simply recites in conclusory language that the replacement plan "results in an abuse of the pension plan termination insurance system." Pet. App. 182a. The record reflects neither that the PBGC "has considered [all] relevant factors," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), nor that the agency has articulated

a "satisfactory explanation for its action," *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43.[32]

As we have previously shown, the PBGC's prohibition of "follow-on plans" impedes the national labor policy by gratuitously interfering with free collective bargaining, and contravenes ERISA's central purpose of enabling employees and retirees to receive their full pension benefits. If the PBGC could show through reasoned and supported analysis that replacement plans such as the one involved here truly constitute an abuse that threatens the foundations of the insurance program, one could then debate whether those rights and interests should have to give way. But the perfunctory, illogical and unsupported analysis that underlies the PBGC's decision falls far short of establishing a legitimate ground for such a result.[33]

---

[32] These deficiencies, of course, cannot be satisfied by "appellate counsel's *post hoc* rationalizations for agency action." *Id.* at 50; *accord Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).

[33] As a final justification for its policy, the PBGC asserts that the adoption of "follow-on plans" somehow "negate[s] plan termination." Pet. Br. at 27. The PBGC asserts that because employees continue to receive something approaching their full earned benefits, "PBGC's insurable event—termination—has not in substance occurred." *Id.* at 29. This assertion is untenable. Whether the USWA/LTV pension plans have "terminated" within the meaning of the statute is a question of statutory construction, and ERISA admits of only one possible construction on this point. When the PBGC acts to terminate a pension plan, the plan is by definition terminated within the meaning of the statute. 29 U.S.C. § 1342. LTV's pension plans *have been* terminated by the PBGC's own action. Nothing in the statute or legislative history supports the notion that if certain types of pension benefits continue to be received, a termination somehow ceases to exist.

As we have seen, Congress' objective when it provided for the payment of nonguaranteed benefits was that to the extent possible employees and retirees would *not* lose accrued benefits after termination. *See supra* at 16-17. It therefore makes no sense to say that provision of such benefits is inconsistent with "termination." And, as we have noted, the PBGC cannot even define with any precision what types of benefits trigger the agency's "*de facto*" theory. *See supra* at 10-12.

Thus, the PBGC's attempt to create from whole cloth a distinction between "*de facto*" and "*de jure*" terminations must be rejected.

II. THE PBGC'S APPLICATION OF ITS "FOLLOW-ON PLAN" POLICY IMPROPERLY IGNORED CONTRACTUAL RIGHTS OF USWA THAT WERE NOT EXTINGUISHED BY THE TERMINATION

Separate and apart from the rights and interests that flow from *ERISA* favoring the receipt by plan participants of "their full benefits," 29 U.S.C. § 1001b(c)(3), in this case USWA had a *contractual* right to the continuation of benefits after the termination of the plans. The PBGC's opposition to the replacement plan in this case, which was established in settlement of the union's contract claims, improperly ignored the union's legitimate contract rights.

To place this point in context it should be understood that when a pension plan that is not created pursuant to a collective bargaining agreement is terminated, an employee generally has no *contractual* right to continue to receive benefits; his rights are limited to those affirmatively created by ERISA. Indeed, even where a collective bargaining agreement is applicable, such agreements typically do not contain provisions obligating the employer to provide pension benefits after plan termination.

USWA, however, has made a point of negotiating contractual guarantees of continued benefits, so that employees will have rights independent of ERISA to continued benefits after plan termination. For many years the agreements between USWA and LTV have included such a contractual guarantee. Thus, as the district court stated, the pension agreements in effect when the PBGC terminated the plans in question "did not limit LTV Steel's obligation to provide benefits in the event of termination of any pension agreements or termination of the pension plans or any pension trusts. Under the pen-

sion agreements, LTV Steel's obligations to fund and pay benefits continue beyond any termination of the agreements themselves." Pet. App. 38a.

The lower courts *and the PBGC itself* have recognized that nothing in ERISA overrides such a contractual obligation, because, as we have noted, the PBGC guaranty program is merely a floor, not a ceiling above which benefits may not rise. *See supra* at 15. Thus, as the courts below pointed out, *the PBGC* "filed a brief as *amicus curiae* in *Murphy v. Heppenstall*[, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982)] in which it supported the claims of [USWA] retirees to recover directly from the employer any non-guaranteed benefits to which the employer had contractually obligated itself and argued that nothing in ERISA imposes a cap on the payment of non-guaranteed benefits." Pet. App. 106a.[34] The Third Circuit in *Heppenstall* agreed with this position:

> ERISA established 'minimum standards' for pension payments due retired employees. Congress endeavored to guarantee retirees at least a portion of the payments a terminated pension plan would have afforded. *It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself.* [*Murhpy v. Heppenstall Co.*, 635 F.2d at 239 (emphasis added).[35]]

[34] The PBGC's *amicus* brief in that case squarely rejected the Heppenstall Company's argument "that Congress intended the liability imposed by 29 U.S.C. § 1362 to be a cap on an employer's obligation to pay pension benefits to its employees and the insurance limitations in 29 U.S.C. § 1322 to be a cap on an employee's right to receive pension benefits funded by his employer." Brief for *Amicus Curiae* Pension Benefit Guaranty Corporation at 3, *Murphy v. Heppenstall Co.*, Nos. 80-1690 & 80-1724 (3d Cir. 1980). Instead, the PBGC contended (correctly) that:

> ERISA . . . establishes only '*minimum standards* for the regulation of private retirement systems . . .' *Keller v. Graphic Systems of Akron*, 422 F. Supp. 1005, 1007 (N.D. Ohio 1976) (emphasis added). It does not impose a cap on the payment of other benefits. Consequently, *an employer's agreement to provide greater benefits is not inconsistent with Title IV of ERISA*. [*Id.* (emphasis added).]

The PBGC's position in *Murphy v. Heppenstall* is entirely inconsistent with its opposition to the replacement plan's payment of non-guaranteed benefits here.

In this case, when LTV ceased paying benefits following the PBGC's termination of the plans, USWA initiated an adversary proceeding against the company in the bankruptcy court, based on the same contract claim (and indeed, the same contract language, *compare* Pet. App. 38a n.5 *with* 635 F.2d at 235) as in *Heppenstall*, seeking payment under the collectively bargained pension agreements of "pension benefits provided by [USWA's] collective bargaining agreements with LTV Steel but not guaranteed by PBGC." *In re Chateaugay Corp.*, 826 F.2d 1177, 1178 (2d Cir. 1987). *See supra* at 8. That court urged the parties to settle USWA's suit. In the collective bargaining agreement that USWA and LTV proceeded to negotiate which established the replacement plan, the parties did precisely that. As the agreement recites and as the court below emphasized, that agreement constitutes a settlement of USWA's contract suit. *See PBGC v. LTV Corp.*, 875 F.2d at 1012, Pet. App. 8a; JA 166-67.

Thus, what the PBGC labels an "abuse" in this case is a good faith settlement of USWA's substantial claim based on its preexisting contract rights—rights which were in no way extinguished by the plan termination.[36]

[35] All other courts that have considered the issue have reached the same conclusion. *E.g.*, *Steelworkers v. Cyclops Corp.*, 860 F.2d 189, 196-97 (6th Cir. 1988); *id.* at 203 (Merritt, J., concurring); *In re M&M Transportation Co.*, 3 Bankr. 722 (S.D.N.Y. 1980); *Machinists Local 1574 v. Gulf & Western Mfg. Co.*, 417 F. Supp. 191 (D.Me. 1976); *Hurd v. Hutnik*, 419 F. Supp. 630 (D.N.J. 1976); *In re Alan Wood Steel Co.*, 4 Bankr. Ct. Dec. (CRR) 921 (Bankr. E.D. Pa. 1978); *see* S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 598 (1988).

[36] Pursuant to 11 U.S.C. § 1113, USWA's contractual claim on behalf of active employees and retirees also survived LTV Steel's

Murphy v. Heppenstall, supra. Nowhere in the administrative process did the PBGC confront this issue. Most significantly, the PBGC made no attempt to explain how its view that the replacement plan here constituted an "abuse" warranting restoration of the termination plans could be reconciled with the Agency's position in *Murphy v. Heppenstall.* The PBGC's failure even to acknowledge, much less to consider, this "relevant factor[]," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 416, leaves the Agency with no "satisfactory explanation for its action," *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43, 57.

CONCLUSION

For the reasons stated, the Court of Appeals' holding that the adoption of the replacement pension program provides no basis for the PBGC's restoration of the terminated USWA pension plans should be affirmed.

Respectfully submitted,

BERNARD KLEIMAN
CARL B. FRANKEL
PAUL WHITEHEAD
KARIN S. FELDMAN
Five Gateway Center
Pittsburgh, PA 15222

BRUCE H. SIMON
RICHARD M. SELTZER
BABETTE A. CECCOTTI
SOPHIA E. DAVIS
330 West 42nd Street
New York, New York 10036

ROBERT M. WEINBERG
(Counsel of Record)
JEREMIAH A. COLLINS
PETER O. SHINEVAR
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 10006

---

filing for reorganization under Chapter 11 of the Bankruptcy Code and remained fully enforceable. *See, e.g., In re Unimet Corp.*, 842 F.2d 879, 885-86 (6th Cir.), *cert. denied*, 109 S. Ct. 81 (1988); *In re Century Brass Products*, 795 F.2d 265, 272 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986).